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ROBERT T. BROCKMAN

12 UNITED STATES OF AMERICA,
13 Plaintiff,
14 v.
15 ROBERT T. BROCKMAN,
16 Defendant.

Case No.: 3:20-cr-00371-WHA

**DEFENDANT ROBERT
BROCKMAN'S NOTICE OF MOTION
AND MOTION FOR CHANGE OF
VENUE ON COUNTS TWO THROUGH**

Date: November 17, 2020
Time: 2:00 p.m.
Judge: Hon. William Alsup

NOTICE OF MOTION AND MOTION

20 PLEASE TAKE NOTICE THAT on November 17, 2020, at 2:00 p.m., or as soon
21 thereafter as the matter may be heard, in the courtroom of the Honorable William Alsup, located
22 at 450 Golden Gate Avenue, San Francisco, California 94102, Defendant Robert Brockman will,
23 and hereby does, respectfully move pursuant to 18 U.S.C. § 3237(b) and Fed. R. Crim. P. 7(c)(1)
24 and (f) to transfer venue for Counts Two through Eight of the Indictment to the United States
25 District Court for the Southern District of Texas, or in the alternative for a bill of particulars
26 relating to the venue motion.

27 This motion is based on the attached memorandum of points and authorities.

1 Dated: November 2, 2020

Respectfully submitted,

2 JONES DAY

3
4 *s/ Neal J. Stephens*
5 NEAL J. STEPHENS

6 Counsel for Defendant ROBERT T.
7 BROCKMAN

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MOTION FOR CHANGE OF VENUE

2 Pursuant to 18 U.S.C. § 3237(b) and Fed. R. Crim. P. 7(c)(1) and (f), Robert Brockman
3 respectfully moves this Court to transfer venue for Counts Two through Eight of the Indictment,
4 charging tax evasion in violation of 26 U.S.C. § 7201, to the United States District Court for the
5 Southern District of Texas, or in the alternative, for a bill of particulars necessary to fully litigate
6 this motion. The Indictment fails to state the basis for venue in this District for Counts Two
7 through Eight, and instead merely repeats conclusory allegations. Because § 3237(b) requires
8 that this motion be “filed within twenty days after arraignment of the defendant upon indictment
9 or information,” Mr. Brockman files this Motion to preserve his statutory right for change of
10 venue.¹ For the reasons stated below, the Motion should be granted on the face of the Indictment,
11 or in the alternative, this Court should order that the government file a bill of particulars alleging
12 the basis for venue in this District for Counts Two through Eight, so as to allow full argument
13 under 18 U.S.C. § 3237(b). Defense counsel met and conferred with government counsel, who
14 opposes the relief sought in this motion.

I. INTRODUCTION

16 On October 1, 2020, the Indictment in this case was filed under seal in the United States
17 District Court for the Northern District of California. Among other charges, the Indictment
18 alleges that Mr. Brockman committed tax evasion in violation of 26 U.S.C. § 7201. Counts Two
19 through Eight of the Indictment allege that Mr. Brockman committed tax evasion by “preparing
20 and causing to be prepared, and signing and causing to be signed, a false and fraudulent United
21 States Individual Income Tax Return, Form 1040” for 2012 through 2018. The Indictment
22 alleges that these tax returns were then submitted to the IRS, but is silent as to where they were
23 filed and received by the IRS. Ind. ¶¶ 136–48 (ECF No. 1). Mr. Brockman’s initial appearance
24 and arraignment were held before Judge Nathanael Cousins on October 15, 2020, and he entered
25 a plea of not guilty to all charges. (ECF No. 9.)

¹ By moving to transfer venue pursuant to 18 U.S.C. § 3237(b) at this time to meet the statutory deadline, Mr. Brockman does not waive any other arguments regarding venue, a further bill of particulars, or other motions that Mr. Brockman intends to make on a schedule to be set by the Court. To the contrary, among other motions, the defense anticipates filing a prompt motion pursuant to Rules 12, 18, 21(a) and (b) for transfer of the entire case to the Southern District of Texas for several reasons, including Mr. Brockman's serious health issues.

1 Mr. Brockman has been a resident of Houston for over forty years, including during the
 2 time of the alleged offenses described in Counts Two through Eight of the Indictment. See Ind.
 3 ¶ 1.² Mr. Brockman has never resided in this District. Under 18 U.S.C. § 3237(b), Mr. Brockman
 4 is entitled to transfer Counts Two through Eight to the Southern District of Texas.

5 **II. ARGUMENT**

6 The Constitution requires that venue for a criminal trial shall be in the state and district
 7 where the offense was committed. U.S. Const. Art. III, § 2, cl. 3; U.S. Const. Amend. VI; *see*
 8 *also* Fed. R. Crim. P. 18. “The burden of establishing proper venue by a preponderance of the
 9 evidence rests with the government.” *United States v. Chi Tong Kuok*, 671 F.3d 931, 937 (9th
 10 Cir. 2012) (citation omitted).

11 When an offense against the United States is “begun in one district and completed in
 12 another, or committed in more than one district,” the government has discretion to prosecute the
 13 offense “in any district in which such offense was begun, continued, or completed.” 18 U.S.C.
 14 § 3237(a). However, alleged violations of 26 U.S.C. § 7201, such as those set out in Counts Two
 15 through Eight, are excepted from this discretionary choice of venue for alleged continuing
 16 offenses. Section 3237(b) provides:

17 Notwithstanding subsection (a), where venue for prosecution of an
 18 offense described in section 7201 [of the Internal Revenue
 19 Code] . . . is based solely on a mailing to the Internal Revenue
 20 Service, and prosecution is begun in a judicial district other than the
 21 judicial district in which the defendant resides, he may upon motion
 22 filed in the district in which the prosecution is begun, elect to be
 23 tried in ***the district in which he was residing at the time the alleged
 24 offense was committed***[.]

25 18 U.S.C. § 3237(b) (emphasis added).

26 The purpose of Section 3237(b) is to prevent the IRS from compelling a taxpayer to face
 27 charges far from his home district. *See, e.g., United States v. U.S. Dist. Court for S. Dist. of*
 28 *California*, 693 F.2d 68, 69 (9th Cir. 1982) (explaining that the purpose of § 3237(b) is “to
 prevent government abuse of such situations, where the prosecution was brought in a district far

² The Indictment also alleges that Mr. Brockman is a resident of Pitkin County, Colorado, which is
 immaterial to this Motion. *See* Ind. ¶ 1.

1 from the taxpayer’s home simply because of the location of the IRS office.”); *see also United*

2 *States v. Melvan*, 676 F. Supp. 997, 999 (C.D. Cal. 1987). In addition, it is also the policy of the

3 Department of Justice “generally to attempt to establish venue for a criminal tax prosecution in

4 the judicial district of the taxpayer’s residence or principal place of business[.]” U.S. Dep’t of

5 Justice, Criminal Tax Manual § 6.01[2] (2012).

6 Section 3237(b) prescribes a statutory deadline for a defendant to move to transfer venue

7 on this ground, providing that such a motion “must be filed within twenty days after arraignment

8 of the defendant upon indictment or information.” *Id.* By its plain terms, § 3237(b) “provides

9 defendants with an absolute right to transfer tax offenses to their home district.” *United States v.*

10 *Nathanson*, 813 F. Supp. 1433, 1436 (E.D. Cal. 1993); *see also United States v. Ostrer*, 458 F.

11 Supp. 540, 541 (S.D.N.Y. 1978) (explaining that § 3237(b) has “been interpreted to give

12 defendants charged with the enumerated offenses an absolute right to have the charges tried in the

13 district of their residence”). Counts Two through Eight allege that Mr. Brockman committed tax

14 evasion in violation of 26 U.S.C. § 7201, an offense specifically enumerated in § 3237(b) and

15 thus eligible for transfer. *See* Ind. ¶¶ 136–48. The government elected to prosecute this case in

16 the Northern District of California, but Mr. Brockman has lived in Houston since at least 1981,

17 including during the time of the alleged offenses described in Counts Two through Eight. *See*

18 *United States v. Scott*, 472 F. Supp. 1073, 1077 (N.D. Ill. 1979), *aff’d*, 618 F.2d 109 (7th Cir.

19 1980) (determining residence for § 3237(b) motion based on factors such as defendant’s present

20 residence with wife and residence at the time of alleged offenses, among other factors).

21 In Counts Two through Eight, the Indictment repeats boilerplate allegations that Mr.

22 Brockman is responsible for “preparing and causing to be prepared, and signing and causing to be

23 signed,” false and fraudulent tax returns that were submitted to the IRS. In addition, the

24 Indictment *does not* allege the basis for venue in this District. Ind. ¶¶ 136–48. The Indictment

25 does not allege that Mr. Brockman mailed these returns in this District, or set out that he caused

26 the returns to be filed in this District, or that the IRS received the returns in this District.³ On the

27

28 ³ “An allegation of the use of the mails in the indictment is not a condition to the invocation of § 3237(b).” *United States v. Youse*, 387 F. Supp. 132, 134 (E.D. Wis. 1975); *see also United States v. Turkish*, 458 F. Supp. 874, 878 n.5 (S.D.N.Y. 1978) (rejecting the government’s argument that § 3237(b) motion be denied because “the

1 contrary, the Indictment fails to allege where any of these actions occurred. Such information is
 2 key to whether or not venue is proper in this District, and whether Mr. Brockman has a statutory
 3 right to invoke Section 3237(b).

4 Mr. Brockman brings this motion at this time to preserve his statutory right to transfer.
 5 Mr. Brockman's arraignment was held on October 15, 2020, and § 3237(b)'s statutory deadline
 6 for transfer is unqualified. *See United States v. Snipes*, 611 F.3d 855, 864 (11th Cir. 2010)
 7 ("Section 3237(b)'s twenty-day statutory deadline for an elective transfer is unambiguous and
 8 unqualified.").

9 **III. CONCLUSION**

10 For the foregoing reasons, Mr. Brockman respectfully requests that this Court (i) transfer
 11 Counts Two through Eight of the Indictment to the United States District Court for the Southern
 12 District of Texas, or (ii) in the alternative, order a bill of particulars as to the allegation of venue
 13 for Counts Two through Eight, and allow further argument of this motion on the basis of such
 14 particulars.

15 Dated: November 2, 2020

Respectfully submitted,

16 JONES DAY

18 *s/ Neal J. Stephens*
 19 NEAL J. STEPHENS

20 Counsel for Defendant ROBERT T.
 21 BROCKMAN

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 indictment does not allege any use of the mails and defendants have not submitted affidavits indicating that the mails
 were used to commit the crime with which they are charged").

CERTIFICATE OF SERVICE

I, Mari Reyes, declare:

I am a citizen of the United States and employed in Santa Clara County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Silicon Valley Office, 1755 Embarcadero Road, Palo Alto, California 94303. On November 2, 2020, I served a copy of the Defendant Robert Brockman's Notice Of Motion and Motion for Change of Venue on Counts Two Through Eight by electronic transmission.

I am familiar with the USDC Northern District's Civil Local Rules 5-1 and 5-5. Under those rules, documents are electronically filed with the court. The court's CM/ECF system will generate a Notice of Electronic Filing (NEF) to the filing party, the assigned judge, and any registered users in the case. The NEF will constitute service of the document. Registration as a CM/ECF user constitutes consent to electronic service through the court's transmission facilities.

To the extent government counsel is not registered in the court's CM/ECF system, I further provided an electronic copy of this document on counsel, as listed below, via electronic mail:

Attorney	Email Address
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Executed on November 2, 2020, at Palo Alto, California.

/s/ Mari Reyes

Mari Reyes

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